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Vol 31

IN THE  
Supreme Court of the United States

OCTOBER TERM, 1940.

No. 605

JACKSON COUNTY, MISSOURI, PETITIONER,  
VS.  
CLARENCE B. REED, TRUSTEE, RESPONDENT.

TO THE HONORABLE CHARLES EVANS HUGHES, CHIEF JUSTICE  
OF THE UNITED STATES SUPREME COURT, AND THE  
ASSOCIATE JUSTICES OF THE UNITED  
STATES SUPREME COURT.

PETITION OF JACKSON COUNTY, MISSOURI, FOR  
WRIT OF CERTIORARI TO THE STATE  
OF MISSOURI.

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**PETITION OF JACKSON COUNTY, MISSOURI, FOR  
WRIT OF CERTIORARI TO THE STATE  
OF MISSOURI.**

Your petitioner, Jackson County, Missouri, respectfully shows:

## I.

**SUMMARY STATEMENT OF THE MATTER INVOLVED.**

This law action arose by respondent, Clarence B. Reed, as assignee, filing in the Circuit Court of Jackson County, Missouri, at Kansas City, on February 24, 1934, a petition in forty-nine counts, seeking to recover from defendant, Jackson County, for various named assignors, balances alleged to be due them from Jackson County, on account of having been named and performed the duties as deputy assessors in Jackson County, Missouri, in various classifications. The total amount prayed for was \$41,673.25 plus interest. The claim of each individual assignor was set up in a separate count in the one petition, and the various claimants constituted the persons whose claims make up the forty-nine counts.

The original petition in count one contained a claim for the plaintiff, Clarence B. Reed, for himself, and the other counts were for the assignors. Count one was dismissed and a subsequent suit filed on the part of plaintiff for himself in his own right and in a separate action. Answers were filed by Jackson County, and on December 11, 1936, an amended answer was filed on the part of Jackson County, to the suit as originally instituted on the forty-nine counts and also in answer to the new suit instituted on the part of Clarence B. Reed, as an individual, which suit was filed on December 12, 1936.

The plaintiff filed a reply to the amended answer on December 28, 1936. On February 24, 1937, a second amended answer was filed on the part of the defendant. Both causes, the original cause and the cause for the plaintiff, Clarence B. Reed, individually, were consolidated and assigned to Division No. 1 of the Jackson County Circuit Court, sitting at Kansas City.

On the 11th day of December, 1936, the Circuit Court heard the testimony of the various witnesses, and the

cause was continued from time to time until the case was finally submitted, and the Court took it under advisement.

On June 10th, 1937, the Court made a finding of facts and on the same day entered a decree in which it dismissed the plaintiff's petition as assignee, and also individually.

In due time, the plaintiff, individually, and as assignee, filed motions for new trial, and in due time, the same were overruled, and, in due time, the plaintiff, both individually and as assignee, did on November 16, 1937, present to the Circuit Court of Jackson County, his application and affidavit for appeal to the Supreme Court of the State of Missouri, which appeal and application was sustained and granted. The appeal was duly docketed and perfected by filing an abstract of the record and a brief in the Supreme Court of Missouri, and after argument and submission of briefs by both parties, the Supreme Court of Missouri, Division Number One thereof, at the September, 1939, Term, filed an opinion in which the Court reversed both causes, that of the individual, and that of the plaintiff as trustee, and remanded the same with directions to enter judgment for the plaintiff as asked. In due time, the defendant asked the court to grant a rehearing to it and the Court in due time overruled said application and thereafter the defendant filed a motion to transfer said cause from Division One to the Supreme Court *en banc*, and the said Division One on September 4th, 1940, overruled said motion to transfer said cause.

The opinion and ruling of the Supreme Court is therefore final and binding upon this defendant. The original petition on the part of the plaintiff, as trustee, is set out on pages 3 to 23, inclusive, of Abstract of Record, as filed in the Missouri Supreme Court.

On December 11, 1936, the court permitted the plaintiff to amend, by interlineation, Count II to Count L, inclusive, as appears on pages 3 to 23 of the Abstract of the Record as filed in the Missouri Supreme Court.

The court permitted the defendant to file a second amended answer which answer appears at pages 35 to 39 of the Abstract of the Record as filed in the Missouri Supreme Court.

After having heard the testimony and having taken the case under advisement, the court did, on the 10th day of June, 1937, make the following findings of facts:

#### "FINDINGS OF FACTS.

##### A.

"The court finds as a matter of fact that Clarence B. Reed is suing, as trustee of an express trust, on behalf of a large number of claimants having similar claims. That this suit is to recover back salary from January 1st, 1931, to June 1st, 1933. That immediately prior to January 1st, 1931, Frank R. English, then assessor of Jackson County, Missouri, after having been informed by the County Court that owing to the falling off in county revenues, the assessor's office would be compelled to reduce its expenditures; that Mr. English took the question of reducing expenses up with his deputies, whereupon it was agreed that in lieu of reducing the number of deputies, that the pay of each deputy would be reduced; that W. F. Cook, in pursuance to said arrangement, certified to the County Court, each month, the number of days worked by each deputy; that said deputies each month signed a payroll made from the aforesaid certificate from the assessor's office, and kept by the County Clerk; that all of said deputies, except John Steinhauser and John Love, were designated as 'D' deputies on said payroll, which payroll gave the number of days, the classification of deputy, the amount of money, and the signature of each deputy opposite his name, and the amount he would receive.

"That a large number of said deputies, excepting Steinhauser and Love, were originally appointed as 'C' deputies, and a large number of same were originally appointed as 'D' deputies.

"The court finds, as a matter of fact, that all of said deputies so designated as 'D' deputies, actually

worked more days per month than was certified to by the chief deputy in the assessor's office, and approved by the County Court.

"The court further finds that the act of the County Assessor in certifying deputies who had theretofore been appointed as 'C' deputies as 'D' deputies, under the aforesaid arrangement, and the said deputies signing the payroll designating them as 'D' deputies and receiving their compensation at the rate of \$6 per day as 'D' deputies, constituted a reappointment of said deputies as 'D' deputies, and a discharge of said deputies as 'C' deputies.

"The court further finds that Steinhäuser and Love, in pursuance of the aforesaid arrangement, received and accepted salaries as 'C' deputies, when in fact they had been originally appointed as 'B' deputies" (R. 240 and 241, 242).

And the Court also gave Conclusions of Law, as follows:

#### CONCLUSIONS OF LAW.

##### A.

"The court finds as a matter of law that the 'C' deputies, by and through the arrangement to reduce the pay instead of reducing the number of deputies, and by received compensation at the rate of \$6 per day, and signing the payroll wherein they were designated as 'D' deputies, are now estopped from claiming any more or further compensation for services as deputy assessors.

"That Steinhäuser and Love, by accepting and receiving compensation as 'C' deputies, and signing the payroll on which they were so designated, are estopped from recovering further compensation" (R. 242).

On the same date, June 10, 1937, the Court entered the following order dismissing the plaintiff's claim:

"Now on this day, this cause having been heretofore heard by the court, and the court being fully

advised in the premises, finds the issues herein in favor of the defendant."

The same order, of course, was given in both cases, that of Clarence B. Reed, individually, and as trustee.

Plaintiff contended that claimants were entitled to recover because they were public officers as defined by Section 9752, Revised Statutes of Missouri, 1929, which provides:

"And every assessor may appoint as many deputies as he may find necessary \* \* \* and who shall take the same oath and have the same power and authority as the assessor himself, while employed as such deputy, or deputies."

Plaintiff further contended that Section 11834, Revised Statutes of Missouri, 1929, provided for the classification of various deputies and the pay for each deputy in such classification, and the language of such statute is as follows:

"Such deputies and assistants" (including deputy county assessors) "shall be divided into classes as follows; and be paid in the same manner as the officers: Class 'A,' chief deputy; Class 'B,' special deputies; Class 'C,' deputies and assistant Clerks; Class 'D,' as deputies who may be employed in offices requiring an extra amount of work during part of the year. \* \* \* Class 'B' shall be paid \$2,100 per year; Class 'C,' \$1,800 per year; Class 'D,' \$6 per day for such time as they may be actually employed in the discharge of their duties."

It was defendant's contention then that plaintiff's original petition did not state a cause of action. Further, that the amended petition did not state a cause of action.

Plaintiff assumed, and Division One of the Supreme Court of Missouri, in its opinion, assumed that Section 11834, Revised Statutes of Missouri, 1929, obtained and were to be applied to the defendant, Jackson County, Mis-

souri. As a matter of fact, Section 11834, Revised Statutes of Missouri, 1929, is not applicable at all.

Section 11833, Revised Statutes of Missouri, 1929 (re-enacted in 1931, and 1933, with changes not here material, except that the population limit was raised to 750,000, Laws, 1931, page 323, Laws of 1933, page 373), fixed the salaries of county officers (including that of the assessor) in counties having a population of 150,000 and less than 500,000. Section 11834, Revised Statutes of Missouri, 1929, which authorizes these officers to employ deputies, classified the deputies and provided for their salaries, by its terms applied to the same counties to which Section 11833 applied.

We contend that Sections 11833 and 11834 *did not* apply to defendant Jackson County during the period from January 1, 1931, to May 31, 1933, the period in which plaintiff's claims are alleged to have accrued.

Plaintiff, in assuming, and the Supreme Court in effect assuming, that this section applied to Jackson County at the time in question, disregarded entirely Section 11808, Revised Statutes of Missouri, 1929, which was a statute of general application throughout the state during this period. It makes express provision for the method of ascertaining the population of a county. It does not resort to the United States Census report, but provides that the "highest number of votes cast at the last previous general election, \* \* \* shall be multiplied by five, and the result shall be considered and held for the purpose aforesaid as the true population of such county," for the "purposes of determining the population of any county in this state, as a basis for ascertaining the salary of any county officer \* \* \* or the amount he shall be allowed to pay for deputies or assistants, \* \* \*"

By Section 13808, Revised Statutes of Missouri, 1929, the Blue Book issued by the Secretary of State is authorized and declared to be the Official Manual of the State

of Missouri. A reference to that manual shows by that method, the smallest population of Jackson County during the period involved was 798,400 (Official Manual for the years 1931-32, page 234, General Election held November 4, 1930, for Superintendent of Schools, 159,680 and multiplied by 5 as per Section 11808 makes a total of 798,400. In Official Manual for the years 1933-34, page 215, General Election held November 8, 1932, Jackson County vote for Governor, page 215, was 257,328, and multiplied by 5 as per Section 11808 was 1,286,640).

Thus, the very section relied upon by plaintiffs (Sec 11834) and by the opinion of the Supreme Court, for the classification did not, in fact, apply to Jackson County.

Since there is no statutory enactment giving a deputy a right to a specific salary, and since he has accepted one which was habitually paid, for two and one-half years, he has received all he is legally entitled to receive, and plaintiff's petition does not state a cause of action, nor does the amended petition state a cause of action.

Having stated no cause of action, then the defendant was entitled to have the Supreme Court of Missouri affirm the trial court in dismissing plaintiff's petition. The Missouri Supreme Court having failed to do so, denied the defendants the right as guaranteed by the Fourteenth Amendment, Section 1, of the Constitution of the United States, which provides:

"\* \* \* Nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Further, the Supreme Court, by its opinion, violated the Fifth Amendment to the Constitution of the United States which provides:

"\* \* \* nor be deprived of life, liberty, or property, without due process of law; \* \* \*"

in that the opinion of the Supreme Court held that the plaintiff was entitled to the benefits of a statute fixing the salary of deputy assessors, as set out in Section 11834, when, in fact, it did not apply to the defendant County by reason of the correct method of population ascertainment showing defendant County had a greater population than that provided for in Section 11834 (Which section was relied upon by Plaintiff, and by Missouri Supreme Court. The section however only applied to counties having 150,000 to 500,000 population).

### **GROUND S RELIED ON FOR THE ALLOWANCE OF THE WRIT.**

#### **I.**

Because the Supreme Court of Missouri, in reversing the decision of the trial court and directing a judgment in favor of the plaintiff, in holding that Section 11834, Revised Statutes of Missouri, 1929, was applicable to Jackson County, ignored and did violence to Section 11808, Revised Statutes of Missouri, 1929, which provided the population should be ascertained by the multiplication of the highest number of votes by five. That if this method is followed, the provisions of Section 11834 would not apply to Jackson County because the population classification would not fit Jackson County.

Thus, the Supreme Court by its holding Section 11834 applied to Jackson County violated the rights of defendant as guaranteed by the Fourteenth Amendment, Section 1, of the Constitution of the United States, which provides:

“\* \* \* Nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.”

Further, the Supreme Court of Missouri, by its opinion, violated the Fifth Amendment to the Constitution of the United States, which provides:

“\* \* \* nor be deprived of life, liberty, or property, without due process of law; \* \* \*”

in that the opinion of the court held that the plaintiff had stated a good cause of action, and in holding that the plaintiff was entitled to the benefits of a statute fixing the salary of deputy assessors, when, in fact, it did not apply to the defendant County.

### **GROUND'S UPON WHICH JURISDICTION OF THIS COURT IS INVOKED.**

#### **I.**

##### **(a) Statutory Provisions, and Constitutional Provisions Believed to Sustain the Jurisdiction.**

The jurisdiction of this court is invoked under the provisions of Title 28, United States Code Annotated, Section 350, page 376; and under the provisions of the Fourteenth Amendment, Section 1, of the Constitution of the United States, and under the provisions of the Fifth Amendment to the Constitution of the United States.

##### **(b) The Date of the Judgment to Be Reviewed.**

The judgment of the Missouri Supreme Court in refusing to transfer the cause to the Court *en banc* was made on the 4th day of September, 1940. The motion for rehearing being overruled on the 7th day of May, 1940, and the opinion of the Supreme Court of Missouri, having been rendered on the \_\_\_\_\_ day of March, 1940. The judgment of the Supreme Court became final on September 4th, 1940. This petition for certiorari, and supporting transcripts are filed in this court within three months from the 4th day of September, 1940.

**(c) Nature of the Case and Rulings of the Supreme Court of Missouri Relied Upon As a Basis of This Court's Jurisdiction.**

The nature of the case and the rulings of the Supreme Court of Missouri, as a basis for this court's jurisdiction, is stated in the petition for certiorari and it would seem to be repetition to restate the same.

**(d) Authority Believed to Sustain the Jurisdiction of This Court.**

The revised rules of this court, adopted February 13, 1939, effective 27, 1939, with appendix thereto, of Federal statutes, sustain the jurisdiction of this court. Rule 38 pertaining to writ of certiorari discloses the reasons which the court will consider as authority for issuance of the writ. We believe the grounds assigned for the writ of certiorari are clearly within the reasons indicated by this court, and that the grounds asserted for the writ show on the face that this court has jurisdiction and should grant the prayed writ of certiorari.

The Fourteenth and Fifth Amendments to the Constitution of the United States guarantee "due process of law," and to permit a recovery by one who has not shown himself to be entitled to the benefits of a statute is a violation of these sections. Further, it is a violation of the two amendments to hold a section will be applicable when it is shown the population classification of the defendant does not meet the classification of the claimed applicable statutes.

**II.**

**STATEMENT OF THE CASE.**

The petitioner has stated the case in the summary statement of matter involved in the petition for a writ of certiorari, which is adopted and made a part of this brief.

## III.

**SPECIFICATIONS OF ERROR INTENDED TO BE  
URGED.**

1. The Missouri Supreme Court erred in reversing the trial court because:

(a) The petition did not contain a statement of a good cause of action, in that no statutory law was shown to have given the plaintiffs a right to any specified sum for their services except Section 11834, Revised Statutes of Missouri, 1929, and that section did not apply to Jackson County, the defendant.

(b) The Court erred in holding that a cause of action had been proven by applying the provisions of Section 11834, Revised Statutes of Missouri, 1929, to Jackson County, when the section only applied to counties having a population of 150,000 to 500,000, when under the provisions of Section 11808, the population of Jackson County (defendant) was ascertained by multiplying the vote by five, which would place defendant in a different classification than that of Section 11834.

(c) The Supreme Court erred in not giving effect to the provisions of the Fifth and the Fourteenth Amendments of the Constitution of the United States, and holding the plaintiff could not recover because he had not shown that some statutory law, which applied to the defendant, gave the claimed right to the specified salary.

## ARGUMENT.

### **I. The Supreme Court Had No Power to Award the Plaintiff a Judgment and Reverse the Trial Court's Dismissal of Plaintiff's Claim, Except That the Plaintiff Show Some Statutory Law Giving the Right to the Claimed Salary.**

It was plaintiff's claim that by reason of the provisions of statutory law giving the deputy county assessors a greater salary than that actually received, they were entitled to the difference. This was the theory of the petition, and the theory of the Missouri Supreme Court. It, therefore, becomes necessary to find what statute it is that plaintiff relies upon.

The petition itself does not set out any statute by reference, or otherwise. The plaintiff merely alleges that defendant county is a "subdivision of the State of Missouri, containing more than 150,000 inhabitants and less than 500,000 inhabitants \* \* \*" (R. 4 of Abstract of Supreme Court of Missouri).

The plaintiff did not make any proof on the subject of population, but assumed that the Court would take judicial notice of the population of the defendant County. In this the plaintiff was right, for it has been held that such matters are by the courts judicially noticed. Such was the holding in *Perkins v. Burks*, 336 Mo. 248, 78 S. W. 2d 845, 1. c. 253-254:

"However, here, there was no disputed fact question; both the census and the total vote at the 1928 presidential election which determined Perkins' salary under the respective contentions of the parties *were facts already determined by public officers of which a court would even take judicial notice* (*Cartwright v. McDonald County*, 319 Mo. 848, 5 S. W. 2d 54)" (Italics ours).

Again, in the case of *Cartwright v. McDonald County*, 319 Mo. 848, 5 S. W. 2d 54, which was relied upon in the Perkins case, says, at l. c. 852:

"If this is so, the respondent was entitled, under the terms of the statute, only to such salary as pertained to the office on November 2, 1920, and that, *we may judicially notice from 1916 official election returns and the provisions of Sections 11352 and 11354, Revised Statutes, 1919*, was the \$1,350 salary he has already received" (Italics ours).

The opinion of the Supreme Court followed the brief of plaintiff in presuming that Section 11834, Revised Statutes of Missouri, 1929, applied to the defendant county.

As a matter of fact, during the period in question, 1931-2-3, that section is not applicable because by the statutory measures of ascertainment of population, defendant county does not fall within its provisions.

Section 11834 is applicable to such counties as have a population of not less than 150,000 and not more than 500,000. It will be noted that plaintiff's petition specifically alleges Jackson County has between 150,000 and 500,000 population (R. 4 of Record in Missouri Supreme Court). However, Section 11808, Revised Statutes of Missouri, 1929, which is a statute of general application to all counties throughout the state, in effect at that time, expressly provides for the method of population classification. It reads as follows:

"Sec. 11808. Salaries of county officers—population, how determined.—For the purpose of determining the population of any county in this state, as a basis for ascertaining the salary of any county officer for any year, or the amount of fees he may retain, or the amount he shall be allowed to pay for deputies or assistants, the highest number of votes cast at the last previous general election, whether heretofore or hereafter held in such county, for any office, shall be multiplied by five, and the result shall be considered and held for the purpose aforesaid as the true population of such county" (Italics ours).

By Section 13808, Revised Statutes of Missouri, 1929, the Blue Book, issued by the Secretary of State is authorized and is declared to be the official manual of the State of Missouri. A reference to the official manuals which set out the vote for state officers at the general election held in 1928-1930, shows that, by use of the methods commanded in Section 11808, the smallest population in Jackson County during the period involved in this suit was 798,400 and in 1932 it was as high as 1,286,640. The following tabulations which are taken from the official Manual show the results as follows when the vote is multiplied by five:

Official Manual (1929-30), at page 239, shows in general election held November 6, 1928, Jackson County vote for Secretary of State was a total of 224,074, which, multiplied by 5, gives a total population in accordance with Section 11808, of 1,120,370.

Official Manual (1931-32), Page 234, for the general election held November 4, 1930, for the office of County Superintendent of Schools, shows a total vote cast for that office of 159,680. This, multiplied by 5 as per Section 11808, gives a total population of 798,400.

Official Manual (1933-34) page 215, for the general election held November 8, 1932, for the office of Governor shows a total vote cast in Jackson County, of 257,328, and when multiplied by 5 as per Section 11808, gives a total population of 1,286,640.

Thus, since the court takes judicial notice of the population of counties, it was demonstrated that Jackson County did not fall into the classification as provided for in Section 11834, as contended by plaintiff.

We, therefore, again submit that the petition of plaintiff fails to state any cause of action, and the proof fails to prove any cause of action which would justify a court in giving to the plaintiff a salary by reason of a statute that did not apply to the county in question.

**Conclusion.**

We, therefore, seek a writ from this Court, of certiorari, to review the opinion of the Missouri State Supreme Court in which it reversed the trial court judgment and ordered that the defendant pay the plaintiff under a statute that is clearly and plainly not applicable to the defendant county in question. We can hardly conceive of any plainer case where the Constitutional rights, as provided for in the Fifth and Fourteenth Amendments on due process of law, have been more flagrantly disregarded and violated. We humbly ask that this court grant a writ to the State Supreme Court and have the error there made by it rectified.

Respectfully submitted,

JOHN B. PEW,  
County Counselor,

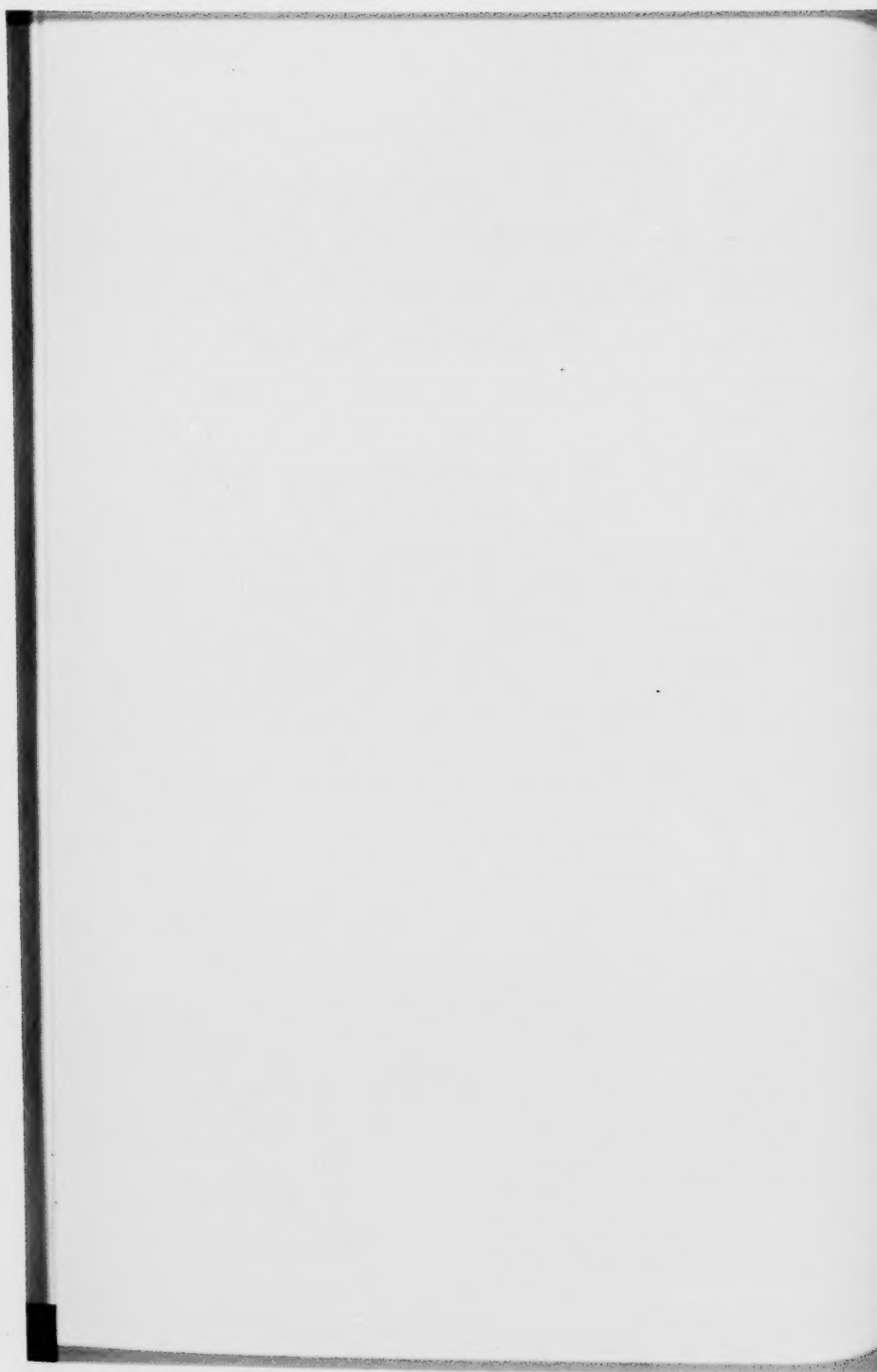
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**APPENDIX.**

1. Opinion, dated January 18th, 1940.
2. Motion for Rehearing, dated March 14th, 1940.
3. Order overruling Motion for Rehearing, dated May 7th, 1940.
4. Motion to Transfer to Court *in Banc*, dated May 15th, 1940.
5. Order overruling Motion to Transfer to Court *in Banc*, dated September 4, 1940.



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**REPLY OF PETITIONER TO RESPONDENT'S MOTION  
AND BRIEF OPPOSING WRIT OF  
CERTIORARI.**

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# Supreme Court of the United States

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## REPLY OF PETITIONER TO RESPONDENT'S MOTION AND BRIEF OPPOSING WRIT OF CERTIORARI.

In his brief, under ground No. I, respondent contends "The petition is devoid of merit because there is involved in this case no federal question, reviewable by the Supreme Court of the United States."

Our answer is briefly stated as follows: The trial court dismissed the plaintiff's cause of action. The Missouri Supreme Court, by its opinion, reversed the trial court and ordered "the cause remanded with direction to enter judgment for plaintiff as asked."

We say the Supreme Court exceeded its jurisdiction in so doing, in that the court held that Section 11834 applied to Jackson County, when in fact the section did not apply to that county. Therefore, if the section did not apply to Jackson County, the Supreme Court had no jurisdiction to order the entry of the "judgment for plaintiff as asked."

It was from the very beginning incumbent upon the plaintiff to allege and prove that during the time involved in this case, the then existing and applicable statutes provided for compensation in excess of that which he received.

"It is well-settled law that a right to compensation for the discharge of official duties is purely a creature of statute, and that the statute which is claimed to confer such right must be strictly construed. *State ex rel. Linn County v. Adams*, 172 Mo. 1, 72 S. W. 655, 656."

*Ward v. Christian County*, 341 Mo. 1115, 1118, 111 S. W. 2d 182, 183.

Plaintiff recognized this obligation and undertook to meet it (R. 9 of abstract of record in Missouri Supreme Court) and defendant challenged his allegations (R. 23). The existence or nonexistence and the applicability or nonapplicability of the various statutes thus appear on the face of the record or by judicial notice. That courts will take judicial notice, not only of the population of cities and counties as shown by the census reports (*Carter County v. Hewitt*, 303 Mo. 194; *State ex rel. Alton R. R. v. Public Service Commission*, 334 Mo. 985; *State ex rel. Hart v. Mazuch*, 68 S. W. 2d 923) but also of the votes cast at general elections and of the results obtained by applying the statutory multiple to the aggregate of such votes is established by the cases of *Cartwright v. McDonald County*, 319 Mo. 848, 5 S. W. 2d 54, *supra*, and *Perkins v. Burks*, 336 Mo. 248, 78 S. W. 2d 845, *supra*.

"If this is so, the respondent was entitled, under the terms of the statute, only to such salary as pertained to the office on November 2, 1920, and that, we may judicially notice from the 1916 official election returns and the provisions of Sections 11352 and 11354, Revised Statutes, 1919, was the \$1,350 salary he has already received."

In *Perkins v. Burks*, *supra*, the court said, l. c. 253-254:

"However, here, there was no disputed fact question; both the census and the total vote at the 1928 presidential election which determined Perkins' salary under the respective contentions of the parties were facts already determined by public officers of which a court would even take judicial notice (*Cartwright v. McDonald County*, 319 Mo. 848, 5 S. W. 2d 54)."

We, therefore, submit that for the Missouri Supreme Court to have held that Section 11834, Revised Statutes of Missouri, applied (which it had to do and, in fact, did do, in order to justify a directed judgment "for the plaintiff as asked") to a county whose population did not bring it within its provisions, was an excess of its jurisdiction and "was in clear conflict with those fundamental principles which have been established in our system for the protection and enforcement of private rights" (*Kentucky v. Am. R. Express Co.*, 273 U. S. 639), and therefore denied the defendant County, by its judicial decision "due process of law" and "equal protection of the law" as guaranteed by the Federal Constitution. A violation by judicial interpretation, or the application of a law that is not in fact applicable is as much an excess of jurisdiction as though it never had jurisdiction of either the parties or the subject matter.

*Saunders v. Shaw*, 244 U. S. 317, 61 L. Ed. 1163, l. c. 1165.

*Home Tel. & Tel. Co. v. City of Los Angeles*, 227 U. S. 278, 57 L. Ed. 510.

*State of Missouri ex rel. v. Gehner*, 281 U. S. 313 74 L. Ed. 870.

## II.

The change of theory doctrine as argued by respondent is not applicable to this case.

In the first place, there is *no* change of theory. Defendant demurred to the plaintiff's petition, thus challenging its stating a cause of action. Further by answer the defendant denied the applicability of *any* statute which gave plaintiff, or his assignors, any rights for any statutory salary.

Even though there be a change of theory and the new or changed theory demonstrates that the plaintiff cannot, under any circumstances recover, then the court must following the changed theory.

In *Curry v. Dahlberg*, 341 Mo. 897, 110 S. W. 2d 742, plaintiff sued on a contract for services. Judgment was entered for the defendant. The services consisted in the plaintiff, a layman, soliciting persons to employ defendant, also a layman, to conduct litigation in their behalf. The court held that, even though the question were not raised by the defendant, the court itself on its own motion would hold the contract to be in violation of the statutes, against public policy, illegal and unenforcible. The court said, 1. c. 906:

"When it clearly appears from the record proper that a plaintiff is not entitled to any relief whatever, an appellate court is justified, if in fact it is not its duty, to so declare even though it must raise the decisive question *sua sponte* and the result would be a reversal (see *Massey-Harris Harvester Co. v. Federal Reserve Bank*, 226 Mo. App. 916, 48 S. W. 2d 158; *Greer v. St. L., I. M. & S. Ry. Co.*, 173 Mo. App. 276, 158 S. W. 740; Secs. 1062-1063, R. S., 1929; 4 C. J. S., Secs. 1239-1368; 3 Am. Jur., Secs. 250-251 and 295). Certainly this court should raise the question where a vitally important matter of public policy is involved, and examination of the bill of exceptions conclusively shows that the judgment rendered by the trial court reached the correct result and should be affirmed."

It is proper to here add that not only in this case will a great amount of public funds be taken, but will invite the prosecution of many other similar cases.

In *Greer v. St. Louis, Iron Mountain & Southern Ry. Co.*, 173 Mo. App. 276, 158 S. W. 740, the court said, l. c. 286-7:

"It is also an unquestioned proposition of law that where a petition is so fatally defective and lacking in essential averments as to fail to state any cause of action, then this objection may be successfully raised at any time and in any manner, and if not raised at some time or in some manner by the parties litigant, then the duty devolves on the court to raise it *sua sponte*; and, while it is true that an objection to the introduction of any evidence on the ground that the petition fails to state a cause of action is looked upon with disfavor by all the courts, yet, as no objection whatever is necessary to save this point, even that method of objection is sufficient as against such a fatal defect."

The court, consequently, went to the length of reversing the cause.

In *Eisen v. John Hancock Mutual Life Insurance Company*, 230 Mo. App. 312, 91 S. W. 2d 81, which was an action upon a group life insurance policy, a judgment in favor of the plaintiff was affirmed. The court said, l. c. 324:

"We agree with the trial court in his conclusion as to the nature of the cards furnished by the defendant. Whether the court was correct in deciding that an application was actually made on behalf of Eisen sufficient to effect insurance upon his life, we need not say, for the reason it is quite apparent that no application was required to be made by or for him. From what we have said there was insurance effective upon the life of Eisen without any application made by or for him. Assuming that the trial court erred in its theory in deciding the case, still we will not reverse the judgment and remand the cause. This, for the reason that under all of the written evidence

and undisputed oral testimony, and the disputed oral testimony, taken in its most favorable light to the defendant, a new trial could not result otherwise than in the same judgment.

"It is true, as contended by the defendant, that ordinarily a case must be decided in this court upon the same theory that it was tried in the lower court. However, this rule is applied only where there is at least a possibility that another result might be reached by another trial. Where there has been a judgment for the defendant and error committed against plaintiff at the trial but the appellate court finds that there can be no recovery by plaintiff upon any theory, or where there had been a judgment for plaintiff and error committed against the defendant and there is a correct theory under which unquestionably plaintiff must recover in view of all of the facts and there is no room for the belief that any further facts would be developed at another trial, so that a new trial would result in the same judgment as the one under review, the appellate court will not reverse the judgment but will affirm it (*Ward v. Quinlivan*, 65 Mo. 453; *Renshaw v. Reynolds*, 317 Mo. 484; *Rolla Produce Co. v. Am. Ry. Exp. Co.*, 205 Mo. App. 646; *Dodson v. Dedman*, 61 Mo. App. 209; *Daniel v. Atkins*, 66 Mo. App. 342; *Anderson v. Railroad*, 131 Mo. App. 580)."

*American Constitution Fire Assurance Co. v. O'Malley*, 342 Mo. 139, 13 S. W. 2d 795.

*Huttig v. Brennan*, 328 Mo. 471, 41 S. W. 2d 1054.

*Holland Banking Co. v. Republic Nat. Bank*, 328 Mo. 577, 41 S. W. 2d 815.

In *Robertson v. Brotherhood of Locomotive Firemen*, 114 S. W. 2d 136 (Mo. App.), the court said, l. c. 139:

"This was an erroneous theory. But if the judgment below was for the right party, even though it was arrived at on a wrong or different theory of the law from that upon which it must rest, yet it should be affirmed on appeal. *Aloe v. Fidelity Mutual Life Ass'n*, 164 Mo. 675, l. c. 700, 55 S. W. 993; *Wilhelm v. Security Benefit Ass'n*, (Mo. App. K. C.) 104 S. W. 2d 1042, l. c. 1046."

We, therefore, conclude this point by saying there is no change of theory, but even so, when, as here, the party does not under any circumstances have a right to recover, and the reviewing court erroneously applies a statute which is not applicable, this amounts to and is an excess of jurisdiction which violates the 5th and 14th Amendments of the Federal Constitution, and affords this court ample grounds for assuming jurisdiction and righting the wrong. "Where there is a wrong, there is a remedy."

### III.

The fact that the defendant, Jackson County, outgrew the classification of Section 11834 and *no other statute applied* would not give a good ground or reason to still apply that section to defendant, Jackson County.

If no express statute gave a right to a fixed salary, then when respondent accepted month after month and year in and year out, what was agreed upon, no cause of action arose in favor of plaintiff (*Ward v. Christian County*, 341 Mo. 1115, 1118, 111 S. W. 2d 182, 183 *supra*).

This court is not called upon to construe Section 11808 "in an unreasonable way that it would result in a hopeless jumble and a mockery of the law" as argued by respondent (p. 10 of Brief). All that this court is called upon to do is to rule the Missouri Supreme Court exceeded its jurisdiction in ruling a directed judgment on a statute that did not apply to the petitioner.

Section 11808 is plain and simple and needs no construing. It merely provides the manner of "determining the population of any county \* \* \* for ascertaining the salary of any county officer \* \* \* or the amount he shall be allowed to pay for deputies or assistants, the *highest number of votes* cast at the last previous general election \* \* \* shall be *multiplied by five*, and the result shall be considered and held for the purpose aforesaid as the true population of such county."

We demonstrated in our argument in support of the writ that the defendant County was not within the 150,000 to 500,000 classification as required by Section 11834.

#### IV.

Petitioner is charged with "dilatory tactics" in that the petition and record for this writ was not filed until a few days short of the three months period allowed by provisions of Title 28, United States Code Annotated, Section 350, page 376. Nevertheless, it was filed within the period provided for in that section.

Also, it is mandatory and proper that we exhaust all remedies we may have in the Supreme Court of Missouri to obtain a proper ruling of this case.

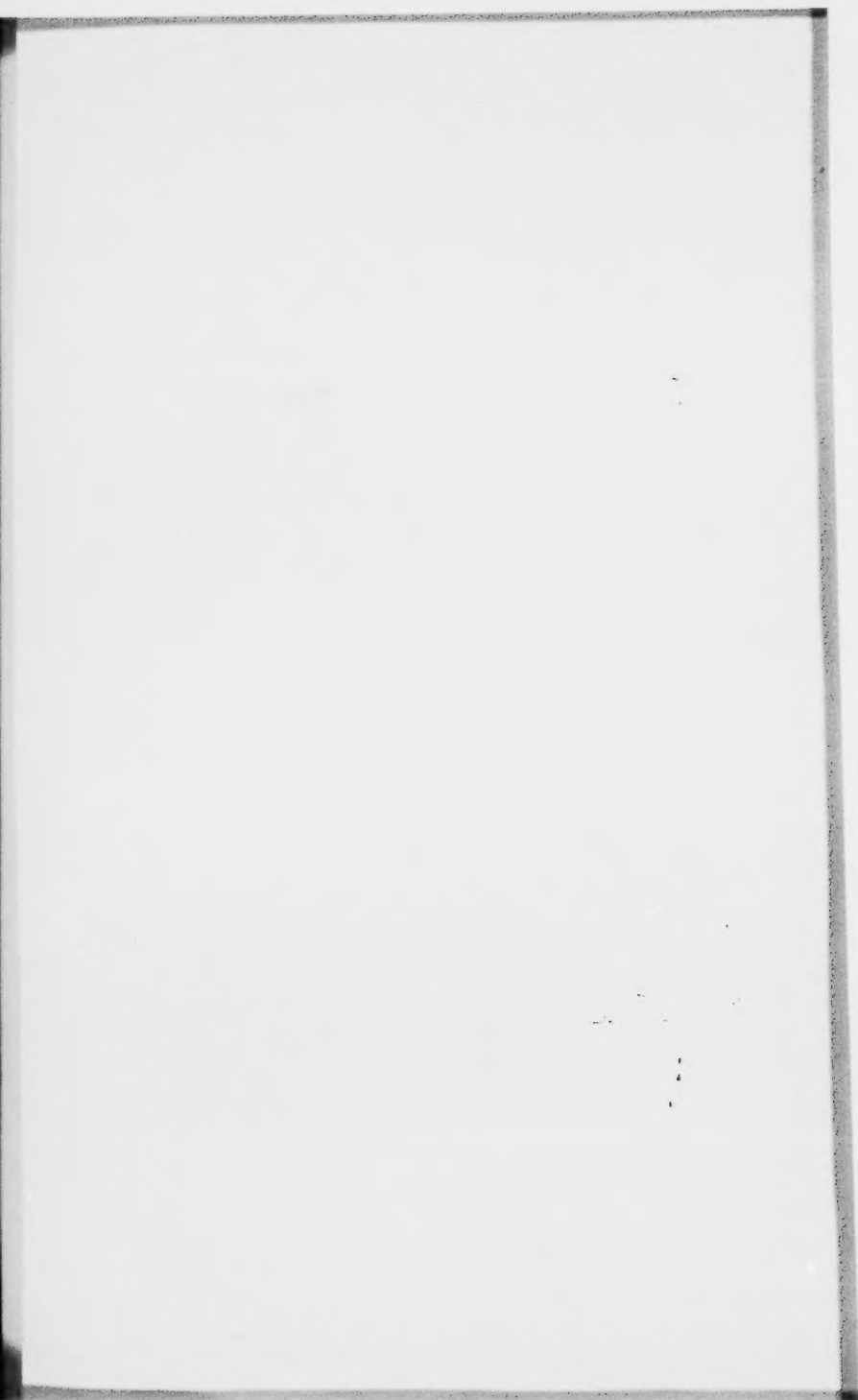
We hardly see how the fact we were diligent, and the *amici curiae* intervened, should destroy our right to a review of a judgment which was based on a petition that did not state a good cause of action, and to review a judgment which was based on an erroneous application of a statute to defendant, which amounted to an assumption of jurisdiction which the court did, in fact, not have.

We submit that the brief of respondent has not shown any logical or proper reason whereby applying Section 11808 to the "highest vote" cast in Jackson County makes Section 11834 applicable to the petitioner.

Respectfully submitted,

JOHN B. PEW,  
County Counselor,

RUFUS BURRUS,  
Assistant County Counselor,  
*Attorneys for Petitioner,  
Jackson County, Mis-  
souri, a Public Corpo-  
ration.*





Office - Supreme Court, U. S.

FILED

DEC 13 1940

CHARLES ELMORE CHAPLEY  
CLERK

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# Supreme Court of the United States

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OCTOBER TERM, 1940.

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No. 605

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JACKSON COUNTY, MISSOURI, PETITIONER,  
VS.  
CLARENCE B. REED, TRUSTEE, RESPONDENT.

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TO THE HONORABLE CHARLES EVANS HUGHES, CHIEF JUSTICE  
OF THE UNITED STATES SUPREME COURT, AND THE  
ASSOCIATE JUSTICES OF THE UNITED STATES  
SUPREME COURT.

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## MOTION AND BRIEF OF RESPONDENT OPPOSING WRIT OF CERTIORARI.

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Clarence B. Reed, Trustee.*

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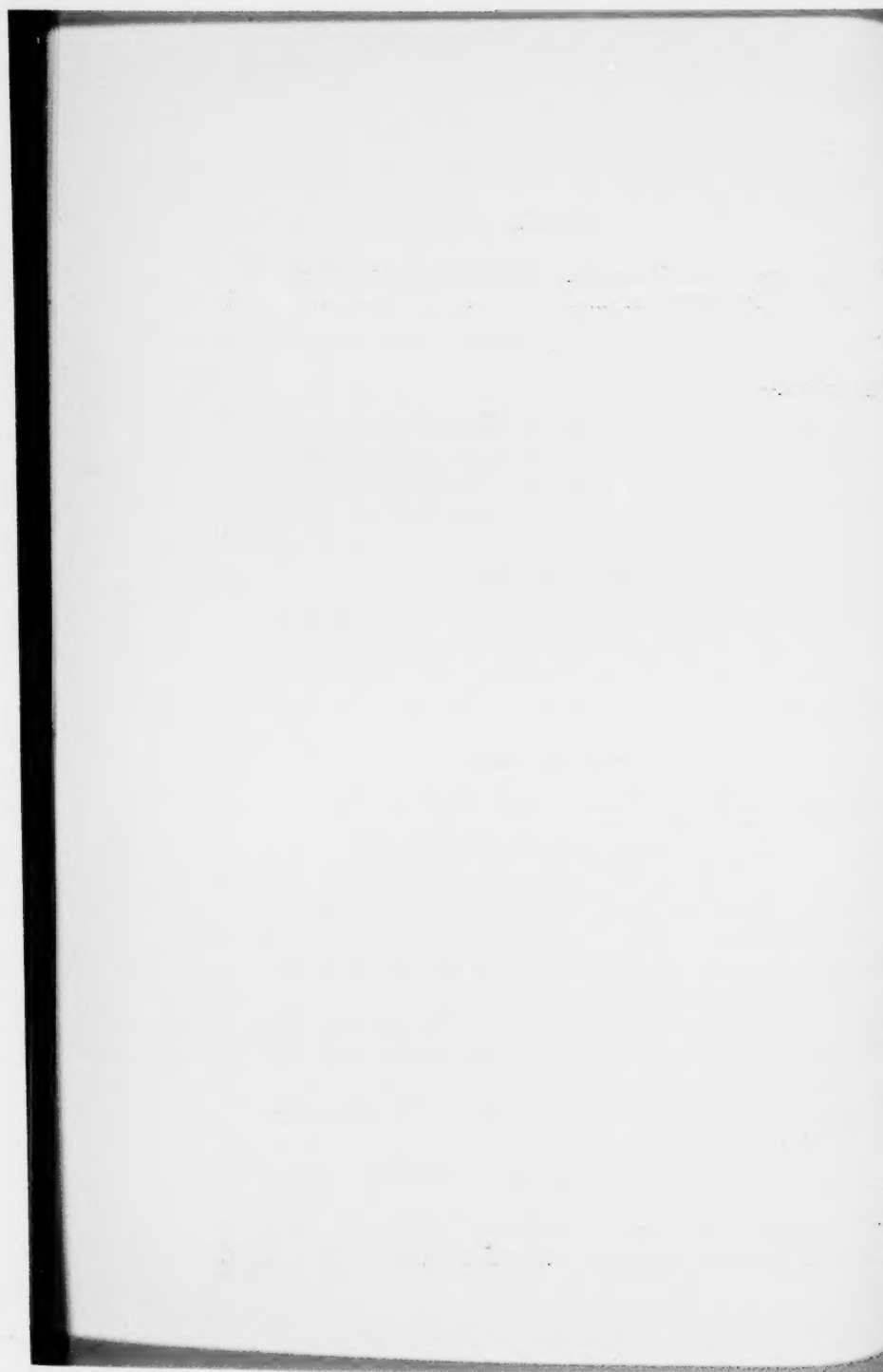
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# Supreme Court of the United States

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TO THE HONORABLE CHARLES EVANS HUGHES, CHIEF JUSTICE  
OF THE UNITED STATES SUPREME COURT, AND THE  
ASSOCIATE JUSTICES OF THE UNITED STATES  
SUPREME COURT.

---

## **MOTION AND BRIEF OF RESPONDENT OPPOSING WRIT OF CERTIORARI.**

Your respondent respectfully moves that the application of the petitioner for a writ of certiorari be denied because said application is devoid of merit and there is involved in this case no federal question reviewable by the Supreme Court of the United States.

In support of said motion, your respondent, Clarence B. Reed, trustee, respectfully shows:

I.

### **Supplemental Statement of Respondent of the Matter Involved.**

The record of the case conclusively shows that it was tried and submitted by the parties in both the trial

court and in the Supreme Court of Missouri on the theory that Section 11834, Revised Statutes of Missouri, 1929, is applicable and the controlling statute. The record of the case discloses that respondent's petitions alleged that Jackson County contained "more than 150,000 inhabitants and less than 500,000 inhabitants" (R. 426), which, in effect, invoked Section 11834, Revised Statutes of Missouri, 1929, the statute applicable to such counties. While petitioner's several answers contained general denials (R. 23, 30, 35), these denials, in so far as the applicability of Section 11834, Revised Statutes of Missouri, 1929, was concerned, were waived and abandoned throughout the trial.

In cross examination of respondent's witnesses (R. 94, 95, 96, 100, 111, 114, 136, 139, 140, 148, 149-50, 161, 166, 176, 177, 178, 179, 181, 183, 191, 192) and in direct examination of his own witnesses (R. 212, 223, 224) petitioner's counsel repeatedly referred to the classification of deputies (into Classes A, B, C and D) provided for in that section, and in that section only, as applicable to the case on trial.

At one place in his cross examination of a witness, counsel made the express statement that it "is the law of this state that a Class D deputy draws \$6 per day" (R. 94) which was conclusive admission that Section 11834 is applicable, in as much as no other section of the statute so provides.

In cross examining as to the number of Class C deputies, counsel referred to the "legal status" of Class C deputies (R. 96-97)—obviously meaning their legal status under Section 11834, which is the only section referring to Class C deputies.

At other places in the record counsel referred to the claim in the suit as being "based on a certain section of the statute" (R. 109), and referred to a certain witness "basing your claim on that same statute" (R. 136)—obviously meaning Section 11834, since no other section was ever mentioned.

The applicability of Section 11834 was also conceded by petitioner in the offering of its proof. The testimony of Senator Harry S. Truman, former presiding judge of the county court, offered by petitioner leaves no doubt that the county court treated Section 11834 as the applicable statute (R. 221-2). We quote these significant parts of Senator Truman's testimony (R. 221-2):

"I was presiding judge of the County Court of Jackson County, Missouri, in 1930, '31, '32 and '33 and during all of those years from 1927 to 1934. I knew Mr. English who was assessor from June, 1929, for four years thereafter, very well; I know him yet. I had conversations with him in 1930 concerning the money available for his department for the year 1931. \* \* \* I know Mr. W. F. Cook very well; chief deputy for Mr. English. \* \* \* Mr. Cook and Mr. English came to the county court and said that if they were allowed to put their deputies on a day basis or a per diem basis, which the law allowed, that they would rather be allocated a certain amount of money for the purpose of operating their office rather than have the number of deputies specified as specific, as a part of the law provided. \* \* \* In other words, have a larger number of 'D' deputies instead of having a group of A, B, C and D deputies, as the law provided; \* \* \*

This clearly and conclusively shows that Senator Truman and the other members of the county court, as well as the assessor and his chief deputy, treated Section 11834 as applicable, in as much as no other section contained the provisions referred to by Senator Truman in his testimony.

The several pay-roll records (R. 238-9) and orders (R. 230, 232, 234) of the county court, offered by petitioner, refer to the classifications of deputies provided for in Section 11834 and clearly show on their face that the county court treated Section 11834 as applicable.

After the opinion of Division Number One of the Supreme Court of Missouri was filed herein, petitioner filed its motion for rehearing and lengthy supporting

suggestions in which it still treated Section 11384 as applicable, and made no suggestions to the contrary. After the motion for a rehearing was overruled, the petitioner filed its motion to transfer the cause from Division Number One to the court *en banc*. This motion contained no challenge whatever as to the applicability of Section 11834. The applicability of said section was first challenged by *amici curiae*, purporting to represent certain quasi-political and civic organizations of Kansas City, in their suggestions in support of petitioner's motion to transfer the cause from Division Number One of the Supreme Court of Missouri to the court *en banc*.

On September 4, 1940, the Supreme Court of Missouri, after having had called to its attention Section 11808, Revised Statutes of Missouri, 1929, by the said *amici curiae* vigorously contending that said section was applicable and controlling, overruled the petitioner's motion to transfer. Thereafter, on the 11th day of September, the petitioner filed in the Supreme Court of Missouri a motion to stay mandate in which it prayed the "court for a period of ninety (90) days to afford it an opportunity to make application for said writ of certiorari." On the same day, the respondent filed, in the Supreme Court of Missouri, suggestions in opposition to motion to stay mandate and, among other statements, it recited "the motion to stay the mandate is dilatory and vexatious, and apparently is filed only for the purpose of harassing, annoying and delaying the plaintiff in error." The petitioner took no steps in the matter of applying for a writ of certiorari until November 30, 1940, upon which date it requested and obtained from the clerk of the Supreme Court of Missouri, certified copies and transcript of the record. The ninety-day period, for which the mandate was stayed, expired on December 3, 1940. Thus counsel for petitioner trifled with the Supreme Court of Missouri in a species of sharp practice.

**GROUND'S RELIED ON FOR DENIAL OF THE  
WRIT.**

**I.**

The petition is devoid of merit because there is involved in this case no federal question, reviewable by the Supreme Court of the United States.

**II.**

This cause was tried and decided in the trial court, submitted and decided in Division Number One of the Supreme Court of Missouri, upon the admitted theory that Section 11834, Revised Statutes of Missouri, 1929, is applicable. It cannot now, therefore, be heard, considered or decided by any court on any other theory.

**III.**

Section 11808, Revised Statutes of Missouri, 1929, is not applicable and does not control the rights of the respondent.

**IV.**

The record contains evidence that the petitioner's application is dilatory and vexatious, and not predicated on meritorious considerations.

## ARGUMENT.

### I.

This cause presents no complicated facts. Reduced to the briefest statement, it is a suit to recover the balance due on official salaries. The schedule of said salaries is explicitly set forth in Section 11834, Revised Statutes of Missouri, 1929. The Supreme Court of Missouri sustained the contention of the respondent on the ground that it would be against public policy and the welfare of the state to deny to any official the full compensation for his services as fixed by law. This decision accords with the majority rule in the United States, hence there is nothing revolutionary in the decision of the Supreme Court of Missouri. From this, it appears that there is no federal question involved. Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. Whether the law of the state shall be declared by its legislature in a statute or by its highest court in a decision is not a matter of federal concern. *Erie R. Co. v. Tompkins*, 304 U. S. 64, 58 S. Ct. 817.

As stated by Mr. Justice Field in *Baltimore & Ohio R. R. v. Baugh*, 149 U. S. 368, 401, 13 S. Ct. 914-937:

"There stands as a perpetual protest against its repetition the Constitution of the United States which recognizes and preserves the autonomy and independence of the states—independence in their legislative and independence in their judicial departments."

Mr. Justice Holmes in *Kuhn v. Fairmont Coal Co.*, 215 U. S. 349, 370-372, 30 S. Ct. 140:

"But the law, in the sense in which courts speak of it today, does not exist without some definite au-

thority behind it. \* \* \* The authority and only authority is the state and, if that be so, the voice adopted by the state as its own (whether it be of its legislature or of its Supreme Court) should utter the last word."

In the light of the foregoing, the petitioner cannot successfully invoke either the Fifth or Fourteenth Amendments of the Constitution of the United States. The record discloses that the petitioner enjoyed "due process of law." Three times, the Supreme Court of Missouri, first, in announcing its decision; second, in overruling petitioner's motion for a rehearing; and, third, in overruling petitioner's motion to transfer it, accorded to the petitioner the benefit of "due process of law."

## II.

The courts of Missouri have uniformly held that, when a case is tried and submitted on one theory, it cannot be tried on appeal on a different theory.

The decision in *Engle v. Worth County*, 213 S. W. 70, 72, is direct in point. In that opinion Judge Graves said:

"In respondent's (Worth County) brief there is a suggestion that the land is not subject to partition because of it being the homestead of Mary C. Walton, the widow. Whether there is substance in this contention need not be decided. Worth County is in no position to urge the question here. This because such was not the theory in the trial below. By answer, Worth County joined in the request for the partition and sale, and asked that her deed of trust be declared a first lien upon the proceeds of sale. The whole proceeding below was not one adverse to the idea of partition. On the contrary, the trial was on the theory that partition was proper, but that it could not be had in kind (owing to the number of interests), and a sale in partition should be ordered. It is trite law that the theory *nisi* cannot be shifted here upon appeal."

In *Sturtevant Co. v. Ford Manufacturing Co.*, 315 Mo. 1025, 1043-4, the respondent (plaintiff), having tried the case on one theory, attempted to shift its theory on appeal. This court refused to permit the shift, and said:

"It has repeatedly been announced by this court that parties are bound on appeal by the theory of recovery adopted by the parties and by the court in the trial below (*Hill v. Drug Co.*, 140 Mo. 433; *Taylor & Sons Brick Co. v. Railway Co.*, 243 Mo. 715; *De- gonia v. Railway Co.*, 224 Mo. 564)."

In *Snyder v. American Car & Foundry Co.*, 322 Mo. 147, 156, 14 S. W. 2d 603, this court said:

"It is elementary that a cause must be heard in the appellate court upon the same theory as that upon which it was tried (*Guthrie v. Gillespie*, (Mo. Sup.) 6 S. W. 2d 886; *Plenieng v. Wells*, (Mo. Sup.) 271 S. W. 62; *Kane v. McMenamy*, 307 Mo. 98, 270 S. W. 662; *St. Louis v. Wright Contracting Co.*, 210 Mo. 491, 109 S. W. 6)."

In *Taylor & Sons Brick Co. v. Kansas City Southern Railway Co.*, 213 Mo. 715, 727, this court said:

"It has repeatedly been announced by this court that the case reviewed by the appellate court will be reviewed upon the theory adopted by the parties in the trial of the cause, and, as was said by this court in *Hill v. Drug Co.*, 140 Mo. l. c. 439, 'It can now be announced as the fixed policy of our practice that parties litigant will be confined to the course of action they have adopted throughout the progress of the trial, even though that action be inconsistent with the course to have been pursued as indicated by the pleadings on file.'"

In *St. Louis v. Wright Contracting Co.*, 210 Mo. 491, 502, the respondent (plaintiff) tried the case on a certain theory, and in this court attempted to change that theory. But this court said:

"It is well settled that a cause must be heard in the appellate court upon the same theory as that upon which it was tried in the trial court (*Walker*

*v. Owen*, 79 Mo. 563; *Minton v. Steele*, 125 Mo. 181; *Dice v. Hamilton*, 178 Mo. 81; *Meyer Bros. Drug Co. v. Bybee*, 179 Mo. 354). And it may be said that no other theory is possible."

### III.

Section 11808 was first enacted in 1887 as a general statute pertaining to the salaries of county officials and setting up the method of determining their compensation upon the basis of population, calculated according to arbitrary rule and not upon official census. Section 11834 was not enacted until 1893 and applied only to Jackson County and counties of its population class. The legislature had the power to repeal Section 11808 in so far as it applied to Jackson County, both as to establishing a fixed schedule of salaries to be paid deputies and determining the population upon the basis of official census. In placing these two sections in parallel columns, this was plainly the intent of the legislature. The fact that Jackson County was at that time becoming a populous community requiring a larger number of deputies to discharge the duties of the several county offices than was required in the average county was sufficient justification for amending Section 11808 by Section 11834 which the legislature plainly intended to do.

The legislature subsequent to 1887 enacted Articles 4, 5 and 6 applying to Buchanan, Green, Jasper and St. Louis Counties, respectively. The enactment of these special acts contained in Articles 4, 5 and 6 of Chapter 84 clearly discloses the adoption of a definite policy by the legislature with reference to the more populous counties. Section 11834, therefore, is not a stray statute, irreconcilable with Section 11808, but is in complete harmony with it and is one of a series of enactments by the legislature showing a definite policy to remove the more populous counties from the provisions of Section 11808. There is nothing in our statutes, we submit, which seems more patent than this fact.

If Section 11808 applies to Jackson County (respondent), then of necessity, by the same argument, it also applies with equal force to Articles 4, 5 and 6, Chapter 84, which govern the salaries of officials and deputies in Buchanan, Green, Jasper and St. Louis Counties, respectively. There is no escape from this reasoning. If, therefore, Section 11808 is the controlling statute both as to salaries of deputies and the artificial method of calculating population, for the purpose of determining their compensation, the plain intent of the legislature would not only be thwarted, but indescribable confusion and chaos would ensue. For example, the populations of Buchanan, Green and Jasper Counties would be elevated to the higher bracket of population applicable to Jackson County and Jackson County, according to this method of calculation, if Section 11808 applies, would be relegated to the class of less populous counties of the state with respect to the matter of salaries of county officials and their deputies. Because there is no county in the state that has a fictitious population of more than one million persons. Certainly, this court is not called upon to construe a statute in such an unreasonable way that it would result in a hopeless jumble and a mockery of the law.

#### IV.

The record discloses that the course of the petitioner in this case has been contradictory and inconsistent. So much so that it arouses the suspicion that the petitioner's defense is not buttressed by merit, but predicated rather upon vexation and delay. In the petitioner's application, filed with the Supreme Court of Missouri, for a stay of the mandate for ninety days, it evidently led the court into the belief that the petitioner would act with due diligence in pressing its application for a writ of certiorari, and probably obtaining a decision of the Supreme Court of the United States, thereon, within the ninety-day grace allowed. Otherwise, the court would either have allowed

a longer period, or would have denied the motion. The petitioner did not act with due diligence. It did not call upon the clerk of the Supreme Court of Missouri for a certified copy of the record until November 30th—three days before the expiration of the ninety-day period. The petitioner not only failed to keep faith with the Supreme Court of Missouri, but it has violated the rights of the respondent by its dilatory tactics.

Again, after petitioner's motion for rehearing in the Supreme Court of Missouri had been denied by that body, it filed a formal motion to transfer the cause from Division Number One, presided over by four of the seven judges of the Supreme Court of Missouri, and who had unanimously determined the issues in the favor of the respondent. In other words, if the cause had been transferred to the court *en banc*, a majority of that body would have decided the issues in favor of the respondent, unless one or more of the four judges of Division Number One had chosen to reverse their decision.

The petitioner, being bound by its various admissions contained in pleadings and in open statements in the trial court and arguments of its briefs that Section 11834, Revised Statutes of Missouri, 1929, was applicable and the controlling statute, was prevented from advancing the theory that Section 11808, Revised Statutes of Missouri, 1929, was the controlling statute. This situation was relieved by the appearance in the case of divers *amici curiae*, purporting to represent certain quasi-political and civic organizations of Kansas City, Missouri, for the first time in the course of the litigation, Section 11808 was invoked. It had never been previously referred to, directly or indirectly. In passing upon petitioner's application, the dilatory tactics, inconsistencies and contradictions of the petitioner and its counsel should be given due consideration.

**Conclusion.**

Petitioner's application for a writ of certiorari should be denied:

(a) There is no federal question involved, reviewable by the Supreme Court of the United States, and the petitioner has been accorded the full benefit of "due process of law."

(b) Supreme Court of Missouri correctly held that Section 11834, Revised Statutes of Missouri, 1929, was applicable and the controlling statute.

(c) Evidence contained in the record indicates that the defense of the petitioner is based upon vexation and delay, and not predicated upon merit.

Respectfully submitted,

DAVID M. PROCTOR,

*Attorney for Respondent, Clarence B. Reed, Trustee.*

*End*

